(3)

No. 03-784

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In The

Supreme Court of the United States

NOREAN HOOTS, L.S.W. of Cass County Social Services, and MONTY MERTZ, Guardian Ad Litem, on behalf of A.B., a Child,

Petitioners,

v.

K.B., F.B., and TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of North Dakota

RESPONDENT TRIBE'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The North Dakota Supreme Court affirmed a decision of a juvenile trial court transferring jurisdiction over a termination of parental rights proceeding involving an Indian child to the Turtle Mountain Tribal Court under the provisions of the Indian Child Welfare Act, 25 U.S.C. §1911(b). The Petitioner contended that the trial court's transfer of jurisdiction violated the Indian Child Welfare Act because the transfer request was untimely and because the application of the Indian Child Welfare Act to the minor child, A.B., violated the child's due process and equal protection rights, and the Tenth Amendment to the United States Constitution. United States Constitution, Amendment's XIV and X. The Petitioner also argued that the Indian Child Welfare Act should not have been applied to A.B., even though she is an Indian child, as defined at 25 U.S.C. §1903(4), who lived most of her life with her parents and Indian grandmother, because of the "Existing Indian Family Exception", a judicially-created exception to the federal law.

1. Whether an Indian child's right to due process of law and equal protection is violated when a state court transfers jurisdiction over a proceeding seeking to terminate the parental rights of that child's parents to the Tribal Court of the Tribe where the child is eligible for membership?

2. Whether a challenge to the constitutionality of the Indian Child Welfare Act, a law premised upon the especial relationship between Indian tribes and the United States government, should be gauged utilizing a strict scrutiny analysis when this Court has rejected such an analysis to legislation affecting Indians for almost two centuries.

QUESTIONS PRESENTED – Continued

3. Whether the North Dakota Supreme Court's rejection of the "Existing Indian Family Exception", a judicially-created exception to the Indian Child Welfare Act that has been and rejected by a majority of state courts to address it, warrants this Court's granting the petition in this case.

4. Whether the Petitioner can challenge the Indian Child Welfare Act, as infringing upon state authority under the Tenth Amendment to the United States Constitution, when the State of North Dakota has voluntarily acceded to the requirements of that federal law by accepting monies under the Social Security Act, 42 U.S.C. §622(11).

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

The Petitioner correctly identifies the parties in her petition. The Turtle Mountain Band of Chippewa Indians is a federally recognized Indian tribe and is not a corporate entity.

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JURISDICTIONAL STATEMENT

The Respondent does not take issue with the jurisdictional statement of the Petitioner.

STATEMENT OF THE CASE

The Respondent takes issue with several assertions in the Petitioner's statement of the case. The Turtle Mountain Band of Chippewa Indians was not notified of the foster care placement of A.B. in March of 2001. Instead, the record before the Court below revealed that the Petitioner sent notice to the Turtle Mountain Tribal Court, and not the Tribe as required by 25 U.S.C. §1912(a), and the Tribe did not learn of the pendency of the proceedings involving A.B. until the grandmother, H.L., a member of the Turtle Mountain Band of Chippewa Indians, sought the Tribe's help to regain the custody of her grandchild in October of 2001. The Petitioner had placed A.B. with her Indian grandmother in March of 2001 after removal from her mother. H.L. already possessed, at that time, a Turtle Mountain Tribal Court order giving her custody of A.B. from 1995. When the grandmother sought some respite from caring for A.B. in October of 2001 because of some personal problems she was experiencing, the Petitioner removed A.B. and refused to return the child to her even after she contacted the Petitioner almost immediately and requested a return of custody. The grandmother then contacted the Tribe in October of 2001 and the Tribe began intervening on behalf of A.B.

The Tribe attempted to transfer jurisdiction of the proceedings in the state court when it was a foster care proceeding in January of 2002, but the mother, K.B.,

objected to the transfer of jurisdiction and the North Dakota District Court properly retained jurisdiction. However, after the Petitioner sought to terminate the parental rights of A.B.'s parents and refused to consider placement with the child's grandmother, even though she was an eligible relative placement under 25 U.S.C. §1915(a), the Tribe renewed its request to transfer jurisdiction and both parents concurred with the transfer request. The Petitioner objected to the transfer and argued that the transfer request was untimely and that the tribal court would be an inconvenient forum for the parties, notwithstanding the Tribal Court's agreement to conduct proceedings in Fargo, North Dakota if necessary. The Petitioner also asserted that the application of ICWA to A.B. was improper because she was not removed from an "Existing Indian Family Exception" and because the transfer of jurisdiction would be contrary to her best interest. The Referee barred evidence on the latter issue finding that it was irrelevant on the procedural issue of transfer.

The Petitioner also attempted to argue to the Referee that the application of the Indian Child Welfare Act to A.B. was unconstitutional because A.B. had never resided in an "Indian Family" and should not therefore be considered "Indian", relying upon a California Court of Appeals decision, *In re Santos Y.*, 92 Cal. App. 4th 1274, 112 Cal. Rptr. 2d 692 (Cal. App. 2d Dist. 2001). A Judicial Referee ruled that the transfer request was untimely and the Turtle Mountain Tribal Court would be an inconvenient forum because she erroneously believed that the Tribe, by filing both a motion to transfer and dismiss the state court proceedings, did not intend to provide for the care of A.B. The Referee did not reach the constitutional challenges to the Indian Child Welfare Act, indicating to the Parties

that they did not need to respond to the constitutional issues because she did not intend to rule upon them. The Tribe requested review before a North Dakota District Court Judge who reversed the Referee and concluded that the Tribe's request to transfer was not untimely and that the Tribal Court would not be an inconvenient forum. The District Court ruled that the constitutional issues were not before it and therefore declined to rule on them. The Petitioner then sought review of the order transferring jurisdiction to the North Dakota Supreme Court.

The North Dakota Supreme Court affirmed the District Court decision in a unanimous opinion in which the Court rebuffed the Petitioner on a number of arguments, including the constitutional arguments she raised. The Court held that the Tribe's motion to transfer jurisdiction, filed approximately six weeks after the petition to terminate parental rights was filed and before any evidentiary hearing on the petition, was not untimely and that the tribal court was not an inconvenient forum because none of the witnesses indicated an inability to appear in the Tribal Court and the Court expressed a willingness to sit in Fargo, North Dakota. The Court also rejected the argument that the District Court should have determined whether the Tribal Court would act in the best interest of the child before deciding to transfer jurisdiction.

The Court also, noting its jurisdiction on appeals from Juvenile Court decisions was de novo, proceeded to address the constitutional issues raised by the Petitioner. The Court rejected the California Court of Appeal's analysis in *In Re Santos Y.*, 92 Cal. App. 4th 1274, 112 Cal. Rptr. 2d 692 (Cal. App. 2d Dist. 2001) finding that the "Existing Indian Family Exception" was a deviation from

the clear language of Congress and permitted state courts to undermine a Tribe's interest in its children. The Court also noted that the child in the *Santos* case had lived almost exclusively in California with his parents who had few or no ties to the child's Tribe in Minnesota, while A.B. lived with both her parents and her grandmother, who was an enrolled member of the Turtle Mountain Band of Chippewa Indians. The Court, relying upon a plethora of decisions issued by this Court, found that allowing A.B's tribe to determine her placement did not violate her rights to equal protection under the law. Lastly, the Court held that Indian Child Welfare Act did not violate the Tenth Amendment to the United States Constitution because it was a proper exercise of congressional authority under the Indian commerce clause, United States Constitution, Art. I, §8. The Tribe had also contended to the Court below that the State voluntarily acceded to complying with the standards of the Indian Child Welfare Act by accepting funding under Title IV-B of the Social Security Act. *See* 42 U.S.C. §622(11).

The Petitioner sought rehearing before the North Dakota Supreme Court, but did not seek a stay of the order transferring jurisdiction. A.B. is now within the exclusive jurisdiction of the Turtle Mountain Tribal Court and has been placed with a relative who is providing excellent care for her. A.B. is now a ward of the Tribal Court under 25 U.S.C. §1911(a) and there is no method for her to be transferred back to the jurisdiction of the North Dakota state courts.

ARGUMENT AGAINST GRANTING THE PETITION IN THIS CASE

The petition for a writ of certiorari should be denied in this case because no active case or controversy continues to exist because A.B. is now within the exclusive jurisdiction of the Turtle Mountain Tribal Court and no legal method exists for the North Dakota state courts to regain any jurisdiction over her. Even if an active case or controversy exists, the North Dakota Supreme Court's decision does not conflict with any rulings of this Court regarding the Indian Child Welfare Act, nor does it conflict with other state courts of last resort regarding the application of the Indian Child Welfare Act. Merely because the North Dakota Supreme Court rejected the aberrant ruling of a California Court of Appeals, which decision is a minority perspective even in the California courts, does not warrant this Court reviewing this matter. Lastly, the North Dakota Supreme Court followed centuries of precedents from this Court finding that Congress has the authority to regulate the affairs of Indian persons without running afoul of the equal protection clause of the Fifth Amendment to the United States Constitution, United States Constitution, Amendment V, or of the Tenth Amendment, United States Constitution, Amendment X, when it upheld the constitutionality of the Indian Child Welfare Act.

A. The North Dakota Supreme Court's Decision Below Does Not Impair Any Due Process or Equal Protection Rights of A.B.

The Petitioner argues that by allowing A.B.'s Tribe to decide her future placement and whether to terminate the parental rights of her parents, the North Dakota Supreme Court violated A.B's substantive due process right to a

"safe and permanent placement". The petitioner does not explain where this right is derived, or why having a Tribal Court decide this issue, rather than a state court, would impair this right. Congress passed the Indian Child Welfare Act in 1978 in an effort to reduce the numbers of Indian children placed in foster care outside their extended families and Tribes. The law is also designed to encourage tribal decision-making in child custody proceedings involving Indian children by compelling state courts to transfer jurisdiction over "foster care placement or termination of parental rights" proceedings to tribal courts, absent objection by either parent or a showing of good cause to the contrary. 25 U.S.C. §1911(b).[1] The jurisdictional provisions of the Indian Child Welfare Act were described by this Court to be at "the heart of" the Act and are designed to create "presumptive jurisdiction" in the tribal court over proceedings that are commenced initially in state courts. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 35-36, 109 S.Ct. 1597, 104 L.Ed. 2d 29 (1989).

This Court has already rejected the argument that the Indian Child Welfare Act's jurisdictional provisions, contained at 25 U.S.C. §1911, infringe upon the due

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[1] That subsection reads:

"In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe".

process rights of Indian children. In the face of a similar argument made in the *Holyfield* case to permitting a tribal court to resolve a dispute over the custody of Indian twins, this Court held:

> "Whatever feelings we might have as to where the twins should live . . . it is not for us to decide that question. We have been asked to decide the legal question of who should make the custody determination regarding these children – not what that decision should be. The law places that in the hands of the Choctaw court".

Mississippi Band Choctaw Indians v. Holyfield, 490 U.S. 30, 53 (1989).[2]

Similarly, in the case below the Court did not find that the need of A.B. for a safe and permanent home was irrelevant, but only that the Turtle Mountain Tribal Court should be the forum to decide the child's placement. Ironically, the Petitioner relies upon decisions such as *Santosky v. Kramer*, 455 U.S. 745, 753 (1982), regarding the right of a child to maintain "familial relationships", as the constitutional basis for this amorphous due process right of A.B., in a case where Petitioner herself was attempting to terminate the child's relationship with her parents and her grandmother and place the child with a non-family member. Apparently, the Petitioner believes that by transferring jurisdiction of the termination of

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[2] Even though *Holyfield* involved a question of exclusive jurisdiction under §1911(a) and not transfer of jurisdiction, it is apparent that the same analysis would apply to a transfer of jurisdiction as that only involves considerations of who makes a decision about a child, not what decision should be made.

parental rights proceeding to the tribal court, thereby denying her the chance to terminate A.B.'s parents' rights, the District court denied A.B. her due process rights. None of the cases she cites in support of this proposition even suggest this, as this would incredulously result in every denial of a termination of parental rights petition rising to the level of a due process violation.

The Tribe, by expressing concern about the Petitioner's apparent unwillingness to consider placement of A.B. with her Indian grandmother and by transferring jurisdiction over the proceeding, was acting to preserve A.B.'s ties to her family in a manner that was more consistent with her due process rights. *See Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977) (city zoning ordinance prohibiting more than one grandchild from living with grandmother infringed upon the due process rights of extended family members to reside together). Although couched in terms of A.B.'s due process rights, it is apparent that the Petitioner's objection to the transfer of jurisdiction does not concern A.B.'s rights, but instead Petitioner's perceived right to decide A.B.'s future placement. There is no such due process right that this Court or any state court of last resort has recognized.

The Petitioner relies heavily upon a California Court of Appeals decision, *In re Santos Y.*, 92 Cal. App. 4th 1274, 112 Cal. Rptr. 2d 692 (Cal. App. 2d Dist. 2001), in support of many of her constitutional challenges to the decision below. The *Santos Y.* decision is not a decision of the California Supreme Court and certiorari would not lie to review the decision below under Supreme Court Rule 10(b). It should also be noted that the decision in *Santos Y.* is not the opinion of all of the appellate districts in California. In *Santos Y.* the California Court of Appeals held

that the Indian Child Welfare Act, in order to preserve its constitutionality, could not be applied to an Indian child who lived in a home with parents who had been assimilated and did not maintain significant ties to an Indian tribe. It should be noted that the California Courts of Appeal are divided on the issue of whether the federal law should apply to all Indian children and the California Supreme Court has refused thus far to resolve the conflicts among the Courts of Appeal there. *Cf. In re Alexandria Y.*, 45 Cal. App. 4th 1483, 53 Cal. Rptr. 2d 679 (Cal. App. 4th Dist. 1996) (accepting doctrine); *Crystal R. v. Superior Court*, 59 Cal. App. 4th 703, 69 Cal. Rptr. 2d 414 (Cal. App. 6th Dist. 1997) (accepting doctrine); *In re Derek W.*, 73 Cal. App. 4th 828, 86 Cal. Rptr. 2d 742 (Cal. App. 2d Dist. 1999) (accepting the doctrine); *In re Bridget R.*, 41 Cal. App. 4th 1483, 49 Cal. Rptr. 2d 507 (Cal. App. 2d Dist. 1996) (accepting the doctrine); *In re Alicia S.*, 65 Cal. App. 4th 79, 76 Cal. Rptr. 2d 121 (Cal. App. 5th Dist. 1998) (rejecting the argument); *In re Adoption of Lindsay C.*, 229 Cal. App. 3d 404, 280 Cal. Rptr.194 (Cal. App. 1st Dist. 1991) (rejecting the argument); *In re Crystal K.*, 226 Cal. App. 3d 655, 276 Cal. Rptr. 619 (Cal. App. 3d Dist. 1990) (rejecting the argument).

The California legislature attempted to curtail judicial attempts to modify the federal definition of Indian child in 1999 by enacting §§7810(a) of the California Family Code and 360.6 of the Welfare and Institutions Code, yet this has not prevented some California courts, including the Santos Y. court, from continuing to embrace the exception when they see fit. This appears to be a California phenomenon, however, as the majority of other state courts, including the North Dakota Supreme Court below, have upheld the constitutionality of the federal law. *See In re Marcus*, 638 A.2d 1158 (Me. 1994); *In re D.L.L. and C.L.L.*, 291 N.W.2d 278 (S.D. 1980); *In re Appeal of Pima County*

Juvenile Action S-903, 635 P.2d 187 (Ariz. App. 1981), *cert. denied*, 455 U.S. 1007 (1982); *Matter of Miller*, 182 Mich. App. 70, 451 N.W.2d 576 (1990); *State ex rel. CSD v. Graves*, 848 P.2d 133 (Or. App. 1993). A majority of other state courts have rejected the attempt to distinguish between Indian children based upon whether they really possess ties to the Indian tribe where they are members of or eligible for membership in. *See Matter of Adoption of Riffle*, 922 P.2d 510 (Mont. 1996); *Matter of Adoption of Baade*, 462 N.W.2d 485 (S.D. 1990); *Burks and Burks v. Arkansas Department of Human Services*, 76 Ark. App. 71, 61 S.W.3d 184 (2001); *Michael J. v. Michael J.*, 7 P.3d 960 (Ariz. App. 2000); *J.W. v. R.J.*, 951 P.2d 1206 (AK. 1998); *In Re Adoption of Baby Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988); *Matter of Baby Boy Doe*, 849 P.2d 925 (Idaho 1993); *In re Adoption of S.S.*, 622 N.E.2d 832 (Ill. App. 1993); *In re Oscar C.*, 559 N.Y.S. 2d 431 (Fam. Ct. 1990); *In re Elliott*, 554 N.W.2d 32 (Mich. 1996); *Utah in Interest of D.A.C.*, 933 P.2d 993 (Utah App. 1997).

The Court's sound ruling below does not deviate from any federal court of appeals or state court of last resort on this issue. The cases from state courts of last resort cited by the Petitioner involved Indian children who never resided with an Indian caretaker, *Matter of Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982), *Matter of Adoption of Crews*, 825 P.2d 305 (Wash. 1992), *Matter of S.C.*, 833 P.2d 1249 (Ok. 1992),[3] or who were the subject of private

[3] It should also be noted that the Oklahoma legislature overturned the "Existing Indian family exception" utilized in this case by enacting Okla. Stat. Ann. Tit. 10, 40.3 in 1995.

custody disputes, *see Rye v. Weasel*, 934 S.W.2d 257 (Ky. 1996), whereas this case involves an Indian child who lived much of her life with her Indian grandmother, who had received custody of her in 1995 from a tribal court.

The Petitioner also urges this Court to grant certiorari because the decision below allegedly violates A.B.'s rights to equal protection under the law. Again, the Petitioner fails to cite one federal decision or decision from a state court of last resort holding that the Indian Child Welfare Act violates equal protection of the laws or should be subject to a strict scrutiny test. To the contrary, this Court's precedents over the past two centuries have recognized that legislation Congress enacts to benefit Indian tribes and persons, or to harm them, do not involve impermissible racial classifications, but instead involve political decisions within the exclusive realm of Congress because of the trust relationship Indian tribes have with the federal government. See e.g., *United States v. Kagama*, 118 U.S. 375 (1886) (Congress has plenary authority to enact federal statutes subjecting Indians to federal criminal jurisdiction); *Choctaw Nation v. United States*, 119 U.S. 1 (1886); *United States v. Pelican*, 232 U.S. 442 (1914); *Seminole Nation v. United States*, 316 U.S. 286 (1942); *United States v. Creek Nation*, 295 U.S. 103 (1935); *Tulee v. Washington*, 315 U.S. 681 (1942).

This trust relationship is derived from Article I, §8, cl. 3, which provides Congress with the power to "regulate Commerce . . . with the Indian tribes". This can result in distinct legislation for Indian tribes and persons that both benefits them, and on occasion harms their interests. *See Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (Congress has plenary authority over Indian lands and can force allotment of those lands even over objection of individual

Indians); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (Congress can diminish reservation by legislative fiat).

As this Court stated in *United States v. Antelope*, 430 U.S. 641 (1977) in response to an argument by an Indian criminal defendant that his equal protection rights were violated because he was subject to more punitive federal, rather than state law:

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.

Antelope, at 645.

The Petitioner's argument that this Court's decisions upholding congressional authority to legislate in the area of Indian affairs only permits it to legislate for Indian tribes and not individual Indians is not supported by any precedent of this Court. In *Morton v. Mancari*, 417 U.S. 535 (1974) this Court upheld a limited employment preference law for the benefit of individual Indians working for the Bureau of Indian Affairs. In *Morton*, this Court rejected the strict scrutiny analysis for the Indian preference program because the distinctions drawn by the statute were not based upon race, but instead the unique trust relationship the United States had toward Indian tribes and individual Indians. *Morton*, at 554. Even more fatal to the argument of the Petitioner that A.B. was denied equal protection because her case was transferred to the jurisdiction of a tribal court, rather than retained in the state

court, is this Court's decision in *Fisher v. District Court*, 424 U.S. 382 (1976) wherein, in the face of an argument that an Indian family was denied equal protection because a state court had no jurisdiction to enter a decree of adoption over an Indian child, it was held that the "exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe". *Fisher*, at 390. Similarly, in this case, the transfer of jurisdiction over the proceedings involving A.B. to the Turtle Mountain Tribal Court was not the result of A.B's race, but instead was the result of the right of the Turtle Mountain Tribe to provide for its children under federal law.

The Tribe acknowledges that A.B. is entitled to due process of law and the equal protection of the law in North Dakota state courts. She was not denied that by the North Dakota courts. Congress has decided, however, that she is entitled to more protections, not less, because of her status as an Indian child and those protections include the right to be raised in a home that reflects her unique culture and heritage. Giving her more protections in an effort to preserve the unique cultural identity of Indian tribes and Indian families is an appropriate exercise of congressional authority. *See In re Marcus*, 638 A.2d 1158 (Me. 1994); *In re D.L.L. and C.L.L.*, 291 N.W.2d 278 (S.D. 1980); *In re Appeal of Pima County Juvenile Action S-903*, 635 P.2d 187 (Ariz. App. 1981), *cert. denied*, 455 U.S. 1007 (1982); *Matter of Miller*, 182 Mich. App. 70, 451 N.W.2d 576 (1990); *State ex rel. CSD v. Graves*, 848 P.2d 133 (Or. App. 1993).

The Petitioner's reliance upon *Gratz v. Bollinger*, 123 S.Ct. 2411 (2003) is misplaced because that case involved an equal protection challenge brought by students who

claimed they were denied rights because of **state** college admissions policies skewed toward minority students, including Indians. There were no federal laws or policies that gave Indian students more rights involved in *Gratz* and the issue was exclusively whether state educational institutions could treat individual students differently. As this Court held in *Washington v. Confederated Bands & Tribes of the Yakima Nation*, 439 U.S. 463, 500-502 (1979):

> It is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive. . . . States do not enjoy this same unique relationship with Indians.

This Court did not repudiate its analysis in *Morton v. Mancari* in *Gratz* and did not analyze whether federal laws specifically legislating for Indian tribes and persons involved invidious racial discrimination. It should be noted that even the United States Department of Education, Office of Indian Education, is directed by Congress to give a "preference to Indian persons in all personnel actions in the Office". 20 U.S.C. §3423c(c). Even if laws such as the Indian Child Welfare Act were subject to a heightened level of scrutiny than the rational basis test utilized by the North Dakota Supreme Court, it is very dubious that a state agency may assert an alleged equal protection violation on behalf of a child who allegedly is receiving more rights than a non-Indian child similarly situated. A state agency does not experience an injury in fact sufficient to confer standing under *Powers v. Ohio*, 499 U.S. 400, 411 (1991) when its only "loss" is the right to attempt to terminate the parental rights over an Indian child. Similarly, an Indian child who gains the extra protections

of the Indian Child Welfare Act cannot point to an injury in fact sufficient to confer standing upon the child's guardian ad litem or state agency allegedly acting on her behalf. Only those persons who can demonstrate that they have been denied a right provided an Indian child or Tribe would appear to have standing to assert an equal protection violation.

This Court should deny the petition for a writ of certiorari requesting review of the North Dakota Supreme Court's rejection of the "Existing Indian Family Exception" and the Court's refusal to follow an aberrant California Court of Appeals decision that ignores centuries of precedents from this Court recognizing congressional authority to legislate for Indian tribes and persons without implicating the equal protection rights of Indians or others.

B. The North Dakota Supreme Court's Interpretation of the Indian Child Welfare Act Is Not Violative of Federal Law

The Petitioner asserts that the North Dakota Supreme Court's decision affirming a District Court order transferring jurisdiction over a parental rights termination proceeding to the Tribal Court was so egregious that this Court's attention is merited. This argument is baseless. The North Dakota Supreme Court's decision comports with federal law in all respects and is on all fours with a majority of State Supreme Court decisions addressing these issues. The Court correctly affirmed a reversal of a Judicial Referee's decision which, among other things, held that a motion to transfer jurisdiction to a Tribal Court should not be granted because the State court would be inconvenienced by having to dismiss its case and that the family involved was "Indians by genetics only". Because

the Indian Child Welfare Act is a federal law that applies solely in state courts there are naturally going to be differences of opinion among the different states on the meaning of the law in different contexts. This Court's certiorari jurisdiction is not appropriate to determine if a state court complied with BIA guidelines or appeared too deferential to tribal concerns, as the Petitioner contends in her petition. The Petitioner does not point to one contrary decision from this Court, a federal appeals court, or a state court of last resort, when she argues at pages 19-21 of her petition that the North Dakota Supreme Court's decision on the timeliness of the motion to transfer and its decision that the Tribal Court was not an inconvenient forum was erroneous. Nor does she point out any overriding federal interest or conflict within the Courts when she contends that the mother's previous objection to a transfer of jurisdiction of the foster care proceeding to the Tribal Court should have barred a request to transfer the termination of parental rights proceeding. This Court's jurisdiction should not be invoked to resolve issues such as these.

C. A State's Rights Under the Tenth Amendment Are Not Violated When It Accepts Federal Monies In Exchange for Complying With Federal Child Welfare Laws and Policies. Congress Has Not Exceeded Its Authority By Enacting the Indian Child Welfare Act

The North Dakota Supreme Court also rejected the Petitioner's argument that Congress exceeded its authority and infringed upon the State's rights under the Tenth Amendment when it enacted the Indian Child Welfare Act and applied it to the states when they care for "deprived

children". The Court's ruling was correct on several fronts and does not conflict with precedents of this Court.

Without a doubt, Congress has enacted much legislation that compels States to comply with certain standards when dealing with deprived children. Most of these laws are codified at Title IV-B, 42 U.S.C. §§620 et seq., and Title IV-E of the Social Security Act, 42 U.S.C. §§670 et seq., and do directly interject into an area historically left to exclusive state authority – child protection. Recently, for example, Congress mandated that States enact laws denying reunification services to parents of deprived children in certain circumstances that Congress found were aggravating as part of the Adoption and Safe Families Act, Pub. L. 105-89, 111 STAT. 2115, codified in part at 42 U.S.C. 671, at §671(a)(15)(D).

Congress also mandates that all States, as a condition of the receipt of monies under Title IV-B of the Social Security Act, have a plan for child welfare services that includes the "specific measures taken by the State to comply with the Indian Child Welfare Act" after consultation with the Tribes in that State. 42 U.S.C. §622(11). North Dakota receives monies under Title IV-B of the Social Security Act and the Petitioner in this case represents a County that receives those Title IV-B monies from the State.

Notwithstanding their intrusion into the area of child protection, these laws do not violate the Tenth Amendment because States voluntarily accede to federal standards in exchange for federal monies. *See Oklahoma v. United States Civil Service Commission*, 330 U.S. 127 (1947) (Tenth Amendment not violated when Congress, as an exercise of its spending power, requires States to comply

with Hatch Act by the receipt of federal highway funds); *see also Florida v. Matthews*, 526 F.2d 319 (5th Cir. 1976) (HHS regulation governing licensure of nursing homes not violative of the Tenth Amendment because states voluntarily accede to federal requirements by accepting monies under Medicaid program). The Petitioner herein cannot accept federal monies with the promise of complying with the federal Indian Child Welfare Act and then complain that the law violates the State's rights and is an unauthorized extension of federal authority. *See Steward Machine Co. v. Davis*, 301 U.S. 548, 595 (1937) (stating that the Tenth Amendment's State sovereignty is not abridged when the States have a choice to reject federal funds and not be bound by federal law).

However, conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs. *See Massachusetts v. United States*, 435 U.S. 444, 461 (1978). The purpose behind ICWA is the preservation of the Indian family and Indian child – clearly a federal interest and a national project for Congress. *See In re Angus*, 655 P.2d 208, 213 (Or. App. 1982) (finding that the integrity of Indian families to be a permissible goal that is rationally tied to the fulfillment of Congress' unique guardianship obligation toward the Indians and that the ICWA is therefore not unconstitutional). It is completely legitimate for Congress to compel States to follow ICWA guidelines as a condition for the receipt of Federal monies, since the purpose behind the enactment of ICWA reflects a federal interest with a national scope. As Congress stated when it enacted the Indian Child Welfare Act:

> There is no resource that is more vital to the continued existence and integrity of Indian tribes

> than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or eligible for membership in an Indian tribe.

25 U.S.C. §1901(3).

The Petitioner argues that Congressional authority to regulate commerce with Indian tribes does not extend to legislating in the area of family and tribal preservation. The Court need not decide this issue because the State of North Dakota has voluntarily acceded to complying with the Indian Child Welfare Act through acceptance of federal monies under Title IV-B of the Social Security Act, enacted by Congress pursuant to its spending powers.

Even if it were an issue, however, the North Dakota Supreme Court's decision is loyal to centuries of precedents from this Court finding that the federal government's relations with Indian tribes are uniquely within the realm of Congress' power and should not be disturbed by the Courts. *See United States v. Mazurie*, 419 U.S. 554, 557 (1975) (Indian commerce clause broad enough to vest Congress with exclusive authority to regulate the sale of alcoholic beverages to tribal Indians wherever situated or into Indian country); *United States v. Kagama*, 118 U.S. 375 (1886) (plenary authority of Congress to regulate Indian affairs sufficiently broad to permit Congress to criminalize conduct by Indians in Indian country); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

This trust relationship between Congress and Indian tribes is constitutionally reflected in the Indian commerce clause of the United States Constitution, Article I, §8, but is not exclusively a product of that clause. So, for example, this Court upheld federal statutes vesting the federal

courts with criminal jurisdiction over Indians, including Indians who were not members of an Indian tribe, even though the Court acknowledged that the Indian commerce clause did not seem to grant such authority to Congress. *Kagama*, at 379. The Indian preference in employment laws for the Bureau of Indian Affairs did not touch upon Indian commerce, but were nonetheless upheld as reasonably designed to further the cause of Indian self-government". *Morton v. Mancari*, at 554. The Petitioner's analysis of the Indian commerce clause as being the exclusive basis for congressional enactments of legislation that treat Indian tribes and persons uniquely is therefore flawed and her contention that children are not commerce is too simplistic considering the almost two centuries of this Court's precedents involving congressional regulation of Indian affairs and persons.

Nor is the fact that A.B. was not an enrolled member of the Turtle Mountain Band of Chippewa Indians at the time the termination of parental rights proceeding was commenced a bar to the application of federal law to her. The definition of Indian child under the Indian Child Welfare Act includes those children who are eligible for membership in an Indian tribe and whose parent is a member of an Indian tribe. 25 U.S.C. §1903(4). Although this definition is perhaps more expansive than other definitions of "Indian" found in other federal laws, it serves an important interest of Congress – to provide protection for young Indian children who were too young to have become members of an Indian tribe when attempts were made to remove them from their families and Tribes.[4]

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[4] For example, the House of Representatives observed that in Minnesota, prior to the enactment of the Indian Child Welfare Act, one

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Such definitions of Indian are not unusual and do not defeat congressional attempts to apply the especial laws applicable to Indian persons. For example, federal laws vesting federal jurisdiction over certain crimes committed by or against Indians in Indian country, *see* 18 U.S.C. §1151, utilize a definition of "Indian" adopted by this Court in *United States v. Rogers*, 45 U.S. (4 How) 567 (1846) which does not turn upon membership in an Indian tribe, but instead requires some affiliation with an Indian tribe and some degree of Indian blood. The federal laws upheld in *Kagama* were based upon the plenary relationship of the federal government toward Indian tribes and did not turn solely upon whether a particular Indian was a member of an Indian tribe. *See* 18 U.S.C. §1153. A.B. is therefore clearly an Indian who is entitled to the extra protections of congressional enactments including the Indian Child Welfare Act.

D. Granting Certiorari In The Instant Case Would Not Resolve An Active Dispute

Because the Petitioner did not seek a stay of the North Dakota Supreme Court decision, the Turtle Mountain Tribal Court has already transferred jurisdiction over A.B. to its Court system and has therefore been vested with exclusive jurisdiction over her under 25 U.S.C.

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out of every four Indian children under the age of one was adopted out to non-Indian families. H.R. Rep. No. 1386, 95th Cong. 2d Sess. (1978), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 7530. Because of tribal requirements for enrollment to establish membership, many of these children were too young to have been enrolled with their Tribes prior to the actions being taken to remove them from their families and Tribes.

§1911(a) because she is now a ward of the Tribal Court. The Tribal Court had been exercising jurisdiction over her since 1995 when the grandmother was granted custody of her through the Tribal Court. Even were this Court to grant the petition in this case and review the North Dakota Supreme Court's decision, any ruling it would issue could not restore jurisdiction back to the North Dakota courts because there is no legal way for the Tribal Court to be forced by North Dakota courts to restore jurisdiction to them over an Indian child. *See St. Pierre v. United States*, 319 U.S. 41, 43 (1943) (certiorari dismissed because Defendant who was challenging contempt citation had already served his contempt penalty); *North Carolina v. Rice*, 404 U.S. 244 (1971) (challenge to an increased sentence after trial held de novo on appeal did not present active case or controversy because Defendant had served his sentence).

In *People in Interest of M.C.*, 504 N.W.2d 598, 602 (S.D. 1993) the South Dakota Supreme Court noted the problems inherent in deciding an appeal regarding an allegedly improper transfer of jurisdiction to a tribal court after the transfer of jurisdiction has already occurred and found that the Tribe had explicitly agreed to a return of jurisdiction to the State court should the child's appeal succeed. In this case, unlike that case, the Petitioner did not seek a stay from the North Dakota Supreme Court, nor from this Court, and the Tribe has not consented to restoring jurisdiction to the State court should the Petitioner prevail before this Court. A decision by this Court would therefore not resolve an active case or controversy.

CONCLUSION

For the reasons stated above, this Court should deny the petition for a writ of certiorari.

Dated this 23rd day of February 2004.

Respectfully submitted:

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